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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 02 054 51589 Office: CALIFORNIA SERVICE CENTER Date: DEC 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 1, 1997. The proffered wage as stated on the Form ETA 750 is $11.79 per hour, which amounts to $24,523.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 1997.

On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of $3,770,006, and to currently employ seven workers. In support of the petition, the petitioner submitted the ETA 750, a copy of the beneficiary's diploma and academic transcript relating to her studies in the Philippines leading to her Doctor of Dental Medicine degree, and a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 12, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In particular, the director requested that the petitioner submit copies of the petitioner's tax returns for the 1997 through 2000 tax years, as well as a copy of the 2001 tax return, if available. The director also requested that the petitioner submit copies of the company's payroll summary, W-2s and W-3s, as evidence of wages paid for 1997 through 2001.[1]

In response, the petitioner submitted Form 1120S corporate tax returns for the petitioner for the years 1997 through 2001. The tax returns reflect the following information for the following years:

	1997	1998	1999
Net income	($69,886)	($10,232)	($36,324)
Current Assets	$18,329	$27,114	$6,199
Current Liabilities	$5,493	$0	$0
Net current assets	$12,836	$27,114	$6,199

	2000	2001
Net income	($616,947)	($133,927)
Current Assets	$114,285	$8,298
Current Liabilities	$44,966	$7,502
Net current assets	$69,319	$796

In addition, counsel submitted copies of the petitioner's checking account statements for the period from January 2001 through April 2002, copies of the petitioner's W-2s and W-3s for the years 1999 through 2001, and copies of payroll summaries for 1997 and 1998. Counsel explained that the California branch office no longer possessed the W-2s and W-3 forms for those years, and time constraints made it impossible to retrieve the documents. The quarterly wage reports/Forms W-2 Wage and Tax Statements reflect wages of only $7,830 for 2001, $16,693.20 less than the proffered wage. The W-2s for the two preceding years, showed wages paid of $29,567.82 for 2000, and $30,011.05 for 1999, amounts which exceed the proffered wage.

With respect to the wages paid for 1997 and 1998, counsel's response to the RFE merely noted that the W-2s were not readily available, and appeared to rely on tax return evidence, and the bank statements as evidence of the petitioner's ability to pay the wage.[2]

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[1] In addition to evidence relating to the petitioner's ability to pay the wage, the director also sought additional evidence regarding the beneficiary's experience. However, the beneficiary's qualifications are not in issue on appeal.

[2] We note that among the documents submitted was also a partial payroll register for 1998, which appears to show gross earnings during one pay period in October of $1,117.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 20, 2002, issued a Notice of Intent to Deny (NOID). The director found that for each year for which the petitioner submitted tax returns, the taxable income was significantly below the proffered wage.[3] When the director examined the evidence of wages paid, he determined that although the petitioner had established the ability to pay the proffered wage for 1999 and 2000, it was not established for 1997, 1998 and 2001.

Counsel responded to the NOID on July 19, 2002, arguing that in cases where the tax returns did not demonstrate the petitioner's ability to pay the wage, supplemental sources of income, to include bank account records, or records of the owner's finances could be used to pay the proffered wage. Counsel cited to several cases in support of this position, and also noted statements allegedly made by an Assistant Center Director to the American Immigration Lawyer's Association in 2002 regarding the willingness of the Service Center to consider evidence such as bank accounts. Counsel went on to assert that the tax returns of the petitioner's owner, Dr. Elliot P. Schlang, which reflected an income of $884,907 for 1997, $2,649,931 for 1998, and$122,308 for 2001, demonstrated that the petitioner had the ability to pay the proffered wage.

After considering the response to the NOID, the director issued a decision denying the petition on August 8, 2002. The decision reiterated its findings regarding the incomplete evidence in support of the petitioner's ability to pay the proffered wage. With respect to the response to the NOID, the director's decision noted and rejected counsel's explanation regarding the unavailability of the W-2 and W-3 forms for the requested years. The decision found counsel's request to consider the personal assets of the petitioner's owner unconvincing, concluding that the petitioning entity, as a corporation, was a distinct legal entity, and that assets of the owner would not be considered in assessing the petitioner's ability to pay the proffered wage. (Director's Decision at p. 3.)

On appeal, counsel asserts that the director erred by failing to consider evidence in the form of the petitioner's bank accounts, and by taking an unduly restrictive view of the petitioner's tax returns as evidence of its ability to pay the proffered wage. Counsel's asserts that caselaw supports the consideration of the petitioner's balances maintained in bank accounts, and that *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), supports the petitioner's position that the income reflected in tax returns is not fairly representative of its financial position. Specifically, counsel argues that the director should have considered income diverted "from the petitioner to the corporation" and treated as an expense that was deducted from Lincoln Dental Center's total income. Such deduction, counsel argues, detracted from the petitioner's true ability to pay; a fact that counsel asserts is supported by a letter from the controller for Schlang Dental Center.[4] Counsel further argues that, as in *Matter of Sonegawa,* the evidence demonstrates that the petitioner is a growing business which has been in operation almost fifteen years, has grown substantially during that time, and has reason to anticipate significantly larger profits in the coming years. We address each of counsel's contentions below.

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[3] Although we agree with the director's conclusion that the tax returns did not demonstrate the petitioner's ability to pay the proffered wage, we disagree, as discussed in greater detail below, with the director's consideration of depreciation in calculating the petitioner's income.

[4] The letter, included in counsel's submission on appeal as Exhibit C, raises an additional issue regarding the current corporation's status as a successor-in-interest, to the original petitioner. That issue is discussed in additional detail below.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

While counsel does not specifically rely upon the assets of the petitioner's owner on appeal, we will address this issue as counsel previously raised it. Reliance on the assets of Dr. [redacted] Schlang is not appropriate. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, while the evidence indicates that the petitioner has employed the petitioner since 1997, it does not establish that the petitioner paid the beneficiary the full proffered wage in 1997.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that

the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. We note that the director considered depreciation expenses in calculating the petitioner's ability to pay the wage. We disagree with this approach. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 1997, however, were only $12,746. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997, or that it paid the full proffered wage during 1998 and 2001. In 1997 and 2001, the petitioner shows losses and minimal net current assets and has not, therefore, demonstrated the ability to pay the proffered wage. In 1998, the petitioner does show sufficient net current assets to pay the proffered wage. We have previously addressed the reasons why the bank account statements and assets of the petitioner's owner are not considered funds available to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1997 and 2001.

We will also address counsel's argument that the caselaw cited supports both that supplementary evidence may be considered, and that insufficient income does not necessarily demonstrate an inability to pay the proffered wage as in *Matter of Sonegawa*. First, although counsel cites to two district cases, those cases, while not binding on the AAO, do not support counsel's position. *O'Connor v. Attorney General,* 1987 WL 18243 (D.Mass., 1987) involved a finding by the court that it was an abuse of discretion for the Immigration and Naturalization Service (now CIS), to fail to consider the personal assets of a sole proprietor in assessing the petitioner's ability to pay the proffered wage. Such a situation is not at issue here, as the facts involve a corporate petitioner and not a sole proprietorship. The second district court case cited, *C & K Corp. v. Sava,* 1986 WL 2816 (S.D.N.Y, 1986), likewise does not support counsel's position, and, if anything, supports the director's decision. The court in *C&K Corp.*, upheld the government's determination that the petitioner had failed to establish the petitioner's ability to pay the wage. The only relationship between the court's decision

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

and counsel's position is that both reference *Matter of Sonegawa,* although the court's decision noted the significant differences between the facts before the court and those present in *Matter of Sonegawa.* Likewise, we are unpersuaded that the facts in this case are sufficiently similar to those in *Matter of Sonegawa.* Unlike *Matter of Sonegawa,* the facts do not demonstrate an uncharacteristic decline in profits, or a steady increase in revenues. Rather, some of the petitioner's greatest losses occurred in the more recent years. Similarly, the revenues generated vary widely from year to year. Although the letter from the controller of Schlang Dental Corporation states that funds were diverted to a the corporate office and reflected as expenses by public accountants, no additional explanation was provided which would indicate how such funds, having been diverted, would nevertheless remain available to pay the proffered wage.

Beyond the director's decision, we find an additional issue raised by the evidence in the record. That issue relates to the recent changes in the business structure of the petitioner and whether the current business entity qualifies as a successor-in-interest to the original petitioner. The letter submitted by counsel on appeal from [redacted] Regional Controller for Schlang Dental Corporation, asserts that the original petitioner [redacted] DDS Inc., dba Lincoln Dental Center, is now known as Schlang Dental Corporation dba Castle Dental Center-Lincoln. The letter offers additional detail noting that effective April, 2001, the company "consolidated Lincoln Dental Center plus 4 other dental centers into one which is now called Schlang Dental Corporation." It appears that Schlang Dental Corporation may be a successor-in-interest to the original petitioner, Elliot Schlang, DDS Inc.

However, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

We find that that record does not clearly support the ability of the current business entity to pursue the instant petition, as no evidence has been submitted to demonstrate that it qualifies as a successor-in-interest. First, assuming that Schlang Dental Corporation wishes to pursue the instant petition, it must submit its own I-140 petition on behalf of the petitioner. *See Memorandum, Amendment of Labor Certifications in I-140 Petitions, HQ 204.24-P from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations (December 10, 1993).* The record does not contain such a petition While it appears that Schlang Dental Corporation may be seeking to pursue the originally filed petition as a successor-in-interest, it is still necessary for it to submit its own I-140 petition.

Second, even after Schlang Dental Corporation submits such a petition, it is still necessary for it to establish that it is the successor-in-interest to the original petitioner. We note that the record does not clearly establish that Schlang Dental Corporation is a true successor-interest to Lincoln Dental Center. While the letter from the controller indicates that the entity came into existence in April 2001, it is unclear under what terms the new entity was created. While *Matter of Dial Auto Repair Shop* requires that a successor entity establish that

it assumed all of the rights, duties, obligations and assets of the original employer, and continue to operate the same type of business as the original employer, it is not clear from the evidence that the instant case meets those requirements as no evidence has been submitted on this issue. It is not clear that Schlang Dental Corporation has, in fact, assumed all of the rights, duties, obligations and assets of the original entity. While it is unnecessary to resolve this issue in this appeal, we note that should there be additional proceedings with regard to this petition, additional evidence on the issue of Schlang Dental Corporation's status as a successor-in-interest would need to be made a part of the record and addressed in any subsequent decision.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1997 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.